

A Few New Developments in the Fourth Amendment

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Introduction

The past year has been relatively quiet along the Fourth Amendment front. The Supreme Court has issued only four opinions addressing significant search and seizure issues.¹ Similarly, the Court of Appeals for the Armed Forces (CAAF) has issued only a handful of published opinions on the topic.² Given the paucity of cases, one might assume that the Fourth Amendment, despite all of its requirements and exceptions, is a relatively stable body of case law. One might also expect that the few cases from the Supreme Court and the military courts leave important Fourth Amendment doctrines unchanged, and that few questions remain.

Those assumptions would be incorrect. Several of the recent cases dealt with extremely important Fourth Amendment issues and further developed Fourth Amendment doctrines. Other cases raised new Fourth Amendment issues. Thus, while it may have been a "light" year for the Fourth Amendment in terms of the number of opinions on the topic, it was certainly not an insignificant one.

This article examines the major Fourth Amendment case holdings by the Supreme Court and the military courts during 1998. After offering a brief analysis of the opinions, the article then presents some practical considerations for counsel confronted with Fourth Amendment issues. For purposes of clarity, this article first address those cases that deal with the predicate question of whether an expectation of privacy exists. The article then examines the cases that discuss probable cause. Next, the article examines the concept of the "reasonableness"

of the execution of a search, addressed in *United States v. Ramirez*.³ Finally, this article examines cases that discuss some of the exceptions related to Fourth Amendment requirements, and reviews *United States v. Jackson*, a military case that deals with military inspections.⁴

Reasonable Expectations of Privacy

Expectations of Privacy in Financial Records

For the Fourth Amendment to apply at all, the person asserting its protections must claim that the government intruded into an area in which he had a "reasonable expectation of privacy."⁵ This is normally broken down into a two-part test, as set forth in *Katz v. United States*.⁶ First, the person who asserts the Fourth Amendment protection against unreasonable searches and seizures must show that he actually believed he had an expectation of privacy in the area that was searched or the property that was seized. Second, he must show that society would view this belief as objectively reasonable.⁷ This is the so-called subjective/objective test that is the starting point for much of Fourth Amendment analysis. If the accused cannot show that he had both a subjective and objective expectation of privacy, the question about whether law enforcement officials properly conducted the search is moot.⁸ In such a case, his privacy, as defined under the law, is not intruded upon in that case, the Fourth Amendment is not implicated, and no search or seizure took place.

1. See, e.g., *United States v. Ramirez*, 118 S. Ct. 992 (1998); *Pennsylvania Bd. of Probation and Parole v. Scott*, 118 S. Ct. 2014 (1998); *Knowles v. Iowa*, 119 S. Ct. 484 (1998); *Minnesota v. Carter*, 119 S. Ct. 469 (1998).

2. See, e.g., *United States v. Hester*, 47 M.J. 461 (1998); *United States v. Miller*, 48 M.J. 49 (1998); *United States v. Curry*, 48 M.J. 115 (1998); *United States v. Light*, 48 M.J. 187 (1998); *United States v. Jackson*, 48 M.J. 292 (1998).

3. *Ramirez*, 118 S. Ct. at 992.

4. *Jackson*, 48 M.J. at 292.

5. Fourth Amendment protections were originally conceived as property-type interests. See *Boyd v. United States*, 116 U.S. 616 (1886). The seminal case in modern search and seizure law, in which the Supreme Court shifted to analyzing Fourth Amendment protections as privacy, not proprietary, interests is *Katz v. United States*. See *Katz v. United States*, 389 U.S. 347 (1967) (establishing the Fourth Amendment "reasonable expectation of privacy" standard).

6. *Id.* at 361 (Harlan, J., concurring).

7. *Id.*

8. Unlike most constitutional tests, the burden of proof in establishing a reasonable expectation of privacy is on the defendant, who must establish *both* prongs of the test. See *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Thatcher*, 13 M.J. 75 (C.M.A. 1982); *United States v. Ayala*, 26 M.J. 190 (1988).

What has happened from time to time, however, is that law-makers have passed statutes that create privacy rights in areas in which courts had previously deemed that no expectation of privacy exists. One such statute is the Right to Financial Privacy Act (RFPA).⁹ The RFPA resulted from a Supreme Court holding that stated that a person has no reasonable expectation of privacy in financial records.¹⁰ As a result, Congress enacted the RFPA in 1978, which makes it illegal to obtain personal finance records without obtaining some form of warrant through the appropriate court or agency.¹¹

The question as to whether the RFPA applies to military members, thus providing them with the same financial privacy rights as civilians, arose in *United States v. Curtin*.¹² In a recent case, *United States v. Dowty*,¹³ the CAAF revisited this issue, along with the related question of whether the RFPA applies to the military *in its entirety*, or whether parts of it are “trumped” by statutes that deal with the same issues under the UCMJ.¹⁴

In *Dowty*, the Naval Criminal Investigative Service (NCIS) investigated the accused for filing fraudulent claims to Bethesda Naval Medical Center since 1994. The NCIS agents subpoenaed the accused’s records with a Department of Defense inspector general subpoena.¹⁵ One of the provisions of the RFPA provides that when such an agency issues an administrative subpoena for financial records, the agency must notify the person whose records have been subpoenaed that he has the right to contest the subpoena in the appropriate federal court.¹⁶ Dowty contested the subpoena in federal court and the parties litigated the issue for eight months.

Several criminal acts allegedly had occurred in 1990 and 1991. As a result, when the government finally preferred the charges in 1996, the five-year statute of limitations under Article 43, UCMJ, had elapsed.¹⁷ Under the RFPA, however, the eight months spent litigating the subpoena tolled any applicable statute of limitation.¹⁸ The operative question for the CAAF was whether the RFPA tolling provision should apply to Article 43, UCMJ.

Judge Effron’s analysis had to do more with statutory application per se than the Fourth Amendment. He stated that, in absence of a valid military purpose, service members have the same rights as civilians, and statutes protecting those rights apply equally to them.¹⁹ Therefore, in dealing with this issue, counsel must look to the *purpose* of a statute and consider whether the statute potentially contradicts military good order and discipline if it is applied to military personnel.²⁰

In *Dowty*, Judge Effron held that the RFPA did not contradict military good order and discipline.²¹ Accordingly, the rules of RFPA, including its rules on tolling statute of limitations, apply. In so holding, the CAAF rejected the government’s argument that the sole exceptions to the Article 43 statute of limitations are contained in Article 43 itself.²² It premised this rejection on four grounds. First, allowing the statute of limitations rules in Article 43 to “trump” the RFPA tolling requirement would turn the RFPA into a “sword” to defeat criminal prosecutions and not just a “shield” to protect financial privacy.²³ Second, when Congress modified Article 43 in 1986, it did so only to increase the length of the statute of limitations and did not consider its relationship to other statutes.²⁴ Third, as evident in the RFPA’s

9. See, e.g., 12 U.S.C.A. §§ 3401-3422 (West 1999).

10. See *United States v. Miller*, 425 U.S. 435 (1976).

11. Unless the customer consents, the RFPA requires the federal government to obtain financial records by means of an administrative subpoena, search warrant, judicial subpoena, or formal written request. 12 U.S.C.A. § 3402.

12. *United States v. Curtin*, 44 M.J. 439 (1996).

13. 48 M.J. 102 (1998).

14. *Id.* at 109-10.

15. *Id.* at 104.

16. 12 U.S.C.A. § 3410.

17. UCMJ art. 43(b)(1) (West 1999). Article 43(b)(1), UCMJ states: “[A] person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.” *Id.*

18. 12 U.S.C.A. § 3419.

19. *Dowty*, 48 M.J. at 107.

20. *Id.*

21. *Id.* at 108.

22. *Id.*

language, Congress intended the RFPA to apply to all applicable statutes.²⁵ Finally, the Department of Defense and the military services contemporaneously implemented the RFPA.²⁶

What are the implications of *Dowty* for Fourth Amendment law in the military? Beyond the immediate impact of the tolling provision applying to service members, it establishes a precedent for analyzing other statutes that provide privacy protections in the absence of, or even contrary to, judicial decisions. In analyzing such statutes, counsel should look initially to the court's holding that such statutes presumptively apply to service members. Next, counsel should consider the courts holding that the presumption is overcome only if the statute, as applied to service members, would contradict good order and discipline. The court in *Dowty*, however, goes further: it examines whether *parts* of a statute should apply, or whether the statute should apply in its entirety. The irony in *Dowty* is that allowing the operative military law—Article 43(b)(1), UCMJ—to apply potentially would undermine good order and discipline. The whole application of the RFPA, to include its statute of limitations, would not. The language of *Dowty* suggests that CAAF will look at a statute's particular parts as well and possibly “pick and choose” which parts should or should not apply to the military, based on policy reasons. Whether or not this sets a destabilizing precedent is hard to say.²⁷ With increasingly sophisticated technology that impacts privacy interests (such as e-mail communications, Internet websites,

and cellular phones), Congress will likely pay more and more attention to privacy; more privacy legislation is therefore likely.

Expectations of Privacy in the Barracks: United States v. Curry

The issue of what constitutes a “reasonable expectation of privacy” in a barracks—if such an expectation even exists—has been one of the most prominent Fourth Amendment issues in military law since *United States v. McCarthy*.²⁸ In *United States v. Curry*,²⁹ the Navy-Marine Corps Court of Criminal Appeals (NMCCA) again dealt with the privacy issue. Yet, when the case came before the CAAF, the court only dealt with this issue in a brief *per curiam* opinion, and did not discuss the reasonable expectation of privacy issue at all.³⁰ In light of *McCarthy*, the status of a right to privacy in the barracks remains somewhat unresolved.

In *Curry*, military police (MP) responded to a call that a homicide would take place in fifteen minutes at a barracks room on the base.³¹ They arrived at the room, knocked on the door, and received no answer.³² One MP then lifted another MP up on his shoulders to look into the barracks room through a gap in the curtains.³³ Inside, he saw a man lying motionless on the bed. The MPs knocked again, but the occupant did not respond.³⁴

23. *Id.* at 109-10.

24. *Id.* at 110.

25. *Id.* at 111.

26. *Id.*

27. Judge Cox's dissent in *Dowty* reads the majority's approach as a form of judicial policy-making. According to him:

Indeed, when you read that opinion [Judge Effron's] you get a warm feeling that it is the right thing to do. It seems just and proper that we toll the statute of limitations against the appellant, because it must be said that he availed himself of the procedural protections of the Right to Financial Privacy Act, 12 U.S.C.A. §§ 3401-3422. How can he now be heard to complain that the statute of limitations found in Article 43 was tolled while he sought the protection of the courts from the governmental search of his bank accounts?

....

This approach, however, begs the question: Can we, or should we, look without the Uniform Code of Military Justice to find laws to expand the statute of limitations on prosecutions of offenses committed by military members?

Id. at 113 (Cox, J., dissenting).

28. 38 M.J. 398 (C.M.A. 1993).

29. 46 M.J. 733 (N.M. Ct. Crim. App. 1997).

30. 48 M.J. 115 (1998) (*per curiam*).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

After waiting for several minutes for the barracks duty officer to arrive with the passkey, the MPs entered the barracks room and found Curry laying face up with his wrists slashed and bleeding.³⁵ While applying first aid, one MP noticed several sheets of paper folded in a bracket in a nearby desk.³⁶ Thinking they might be suicide notes that might help them determine if Curry had ingested something lethal, an MP opened them and found two notes incriminating Curry in the murder of a lance corporal.³⁷

At trial, Curry moved to suppress the letters. The military judge, however, ruled that looking into the room from a public sidewalk was not a search, and the entry itself was lawful as an emergency search to save a life.³⁸ On appeal, the NMCCA considered whether or not looking into the room constituted a search. In so doing, the court placed little emphasis on *Katz v. United States*.³⁹ Rather, the court focused more attention on *Dow Chemical v. United States*, which held that the government has greater latitude to conduct warrantless inspections in areas where there is a “reduced expectation of privacy.”⁴⁰

The Navy-Marine Corps Court applied *Dow*’s “reduced expectation of privacy” standard to interpret the *McCarthy* holding.⁴¹ The court stated that *McCarthy* need not be read “to say that there is no circumstance under which a military member would have a reasonable expectation of privacy in a military barracks room to conclude that this appellant [Curry] had, at least, a *reduced* expectation of privacy in his barracks room.”⁴² In light of this reduced expectation of privacy, the court held that the judge did not abuse his discretion in ruling that the initial observation was not a search.⁴³ In so holding, the court relied on several facts: (1) that the MPs had not physically intruded into the room when they saw the body, (2) that the MPs did not use sophisticated surveillance equipment, and (3) that

the MPs were on a public sidewalk (although not at the same height a normal person would be) when they looked into the room.⁴⁴

That “abuse of discretion” standard applied by the lower court created an appellate issue when the case went before the CAAF. The CAAF upheld the decision in a *per curiam* opinion.⁴⁵ The CAAF clarified that Fourth Amendment issues are reviewed *de novo*, and not under an abuse of discretion standard.⁴⁶ With only scant discussion, the opinion simply asserted that the military judge “did not err” in admitting the evidence under the emergency exception to the Fourth Amendment. The CAAF did not comment on the initial peering through the gap in the curtains prior to the emergency search. The CAAF also did not comment on the NMCCA’s opinion that a “reduced expectation of privacy” in the barracks existed, rather than no expectation of privacy at all. It did not indicate the NMCCA was correct in its reading of *McCarthy*. Moreover, the CAAF did not step in and indicate that the NMCCA’s analysis of the search was unnecessary because no reasonable expectation of privacy exists in the barracks.⁴⁷

Reading these two cases together, therefore, leads one to assume that *McCarthy* did not abolish any expectation of privacy in the barracks, but reduced it to a lower level than one finds in private civilian dwellings. By failing to comment on the standard in *Curry*, which was modeled on *Dow*, the CAAF allows itself flexibility in deciding how to establish more definitive guidelines. At least the lower court’s decision in *Curry* reaffirmed that the “sacred curtilage” doctrine does not apply in the military barracks. Accordingly, peering through gaps in the curtains into a barracks room will *not* constitute an unreasonable intrusion.⁴⁸ Although it did not look at the reasonable expectation of privacy issue, the CAAF did address the ques-

35. *Id.*

36. *Id.*

37. *Id.* at 115-16.

38. *United States v. Curry*, 46 M.J. 733, 736 (N.M. Ct. Crim. App. 1997).

39. *Id.* (citing *Katz v. United States*, 389 U.S. 347 (1967)).

40. *Id.* at 739-40 (citing *Dow Chemical v. United States*, 476 U.S. 227 (1985)). The court also discussed reduced expectations of privacy in automobiles. *Id.* (citing *California v. Carney*, 471 U.S. 386 (1984); *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

41. “Therefore we will apply by analogy the *Dow* reduced expectation of privacy standard in determining whether surveillance of a service member in a military barracks room constitutes a Fourth Amendment search.” *Id.* at 740.

42. *Id.* (emphasis added).

43. *Id.*

44. *Id.*

45. *United States v. Curry*, 48 M.J. 115 (1998) (*per curiam*).

46. *Id.* at 116.

47. *Id.*

tion of physically *entering* the room under the emergency search doctrine, which also applies in the civilian context. Therefore, it is difficult to determine exactly what a “diminished expectation of privacy” in the barracks means, aside from apparently meaning that the “sacred curtilage” doctrine does not apply. *McCarthy*, read in light of *Curry*, will continue to generate controversy.

*Minnesota v. Carter: Asserting Privacy During Business
(Whether Legal or Not)*

The Supreme Court also focused on expectations of privacy in *Minnesota v. Carter*.⁴⁹ In that case, the Court held that the defendants, who were in another person’s apartment for a brief period of time for the sole purpose of packaging cocaine, did not have a reasonable expectation of privacy in the apartment.⁵⁰

In *Carter*, a police officer, relying on a tip from a confidential informant, went to an apartment building to investigate drug activity.⁵¹ He looked through the same window that the informant had peered through. Through a gap in the curtains, he observed two men bagging cocaine.⁵² It was later revealed that the two men had never been to the apartment before, were there for only two and half-hours, and had come to the apartment for the sole purpose of bagging the cocaine.⁵³

Writing for the majority, Chief Justice Rehnquist rejected any analysis under the Fourth Amendment’s “standing” doctrine, citing the Court’s rejection of that doctrine in the case *Rakas v. Illinois*.⁵⁴ Instead, Rehnquist focused on the substantive Fourth Amendment doctrine of whether the defendants had a reasonable expectation of privacy in the apartment.⁵⁵ The test, as enunciated by Rehnquist was twofold: “[A] defendant must

demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable”⁵⁶

While that language evokes the two-part *Katz* test, the court did not explicitly read the facts under the *Katz* subjective/objective test. Although Rehnquist referred to the famous line from *Katz* that “[T]he Fourth Amendment protects people not places,”⁵⁷ he focused in particular on the Court’s holding in *Minnesota v. Olson*, which held that overnight guests do have an expectation of privacy.⁵⁸ Distinguishing the two cases, Rehnquist focused on several particular facts in *Carter*: (1) the lack of a previous connection between the apartment owner and the defendant, (2) the “purely commercial nature of the transaction,” and (3) the short amount of time on the premises by the defendant.⁵⁹

While *Minnesota v. Carter* may not shed light on the debate about expectations of privacy in the barracks, it did reaffirm (even if it did not explicitly follow) the “reasonable expectation of privacy” doctrine of *Katz*. Additionally, it rejected any idea of analyzing Fourth Amendment searches and seizures under the “standing” concept. Finally, it again demonstrated that drug dealers “rarely win in the Supreme Court by invoking the Fourth Amendment.”⁶⁰ It would be misleading to conclude that it creates a “bright line rule,” with “private” activity as protected and “commercial” activity as not. Several questions remain unanswered. For example, at what point would the drug dealers’ activities in the apartment become “private” and not simply commercial? What if the operation had taken them through the night, forcing them to sleep there, even briefly? The fluidity of the reasonable expectation of privacy concept—criticized by Scalia in his concurrence⁶¹—lends itself to this fact-dependent determination, and, consequently, to the endless permutations on the scope of Fourth Amendment protection.

48. The Court of Military Appeals (now the CAAF) previously addressed this question in *United States v. Wisniewski*. In *Wisniewski* the court held that peering through a 1/8 inch by 3/8 inch crack in the venetian blinds from a barracks was not a search. See *United States v. Wisniewski*, 21 M.J. 370 (C.M.A. 1986).

49. 119 S. Ct. 469 (1998).

50. *Id.*

51. *Id.* at 471.

52. *Id.*

53. *Id.*

54. *Id.* at 472 (citing *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978)).

55. *Id.*

56. *Id.* (citation omitted).

57. *Id.* at 473 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

58. *Id.* at 473-75 (citing *Minnesota v. Olson*, 495 U.S. 91 (1990)).

59. *Id.* at 474.

60. David G. Savage, *Police Peeking Protected*, A.B.A. J., Feb. 1999, at 32.

Probable Cause Issues

Probable Cause: Aguilar and Spinelli are Dead . . . Sort of . . .

One of the most important determinations in Fourth Amendment law is whether probable cause exists to justify a search or seizure. If the government intrudes into an area where a person has a reasonable expectation of privacy, the search or seizure must be supported by probable cause, unless an appropriate Fourth Amendment exception applies. Probable cause determinations were, for many years, made using the two-pronged *Aguilar-Spinelli* test, named after a pair of Supreme Court cases.⁶² The two prongs that had to be satisfied were: (1) the “basis of knowledge” prong (how did an informant know evidence was where he said it was), and (2) the “veracity” prong (why is the informant reliable or credible?).⁶³ Furthermore, the government could use corroborative evidence to “bolster” one or both of the prongs.⁶⁴

The Supreme Court replaced the *Aguilar-Spinelli* test with a more fluid “totality of the circumstances” test in the landmark case *Illinois v. Gates*.⁶⁵ *Aguilar-Spinelli*, however, did not “die,” at least as a valuable method to determine probable cause.⁶⁶ The CAAF recently demonstrated the usefulness of this test in *United States v. Hester*.⁶⁷

Hester was convicted of possessing and distributing marijuana, and received eight years confinement. The issue before the CAAF was whether the search authorization of his on-post room at the Young Men’s Christian Association (YMCA) by a military magistrate was supported by probable cause.⁶⁸ In argu-

ing that probable cause did not exist, Hester asserted that the informant, who provided the information for the search, had no history of credibility, had made no statement against interest, was jealous because he was seeing another woman, was herself a drug user, and had never been in the YMCA room.⁶⁹

Writing for the majority, Judge Crawford acknowledged that the required test was the *Illinois v. Gates* “totality of the circumstances” test. Nevertheless, she analyzed the probable cause question under the old *Aguilar-Spinelli* test.⁷⁰ According to Judge Crawford, the government satisfied the first prong of the test. In the facts, Hester had told the informant that he had forty-five bags of marijuana stored (strangely enough, in *her* own house), that he intended to distribute the marijuana, that he resided in room 103 at the YMCA, and that he would be “rocking” (slang for making crack) in his YMCA room.⁷¹

Using the *Aguilar-Spinelli* test, the troublesome questions arose concerning the “veracity” prong. While Hester’s own statements to the informant established her basis of knowledge, how was this informant credible? As permitted by *Aguilar-Spinelli*, the court relied on the corroboration of some of her statements. This first-hand information was at least partially corroborated prior to the search taking place: forty-five bags of marijuana were indeed found in her house, and a CID agent confirmed that Hester was staying at room 103 in the YMCA.⁷² Therefore, both prongs were sufficiently satisfied, and probable cause existed to conduct the search.⁷³

One may wonder—as Judge Sullivan did in his concurrence—about using a test that is no longer required.⁷⁴ The answer may be that, while *Aguilar-Spinelli* is not required, it

61. *Carter*, 119 S. Ct. at 476 (Scalia, J., concurring). “In my view, the only thing established about the *Katz* test . . . is that, unsurprisingly, those actual (subjective) expectation[s] of privacy that society is prepared to recognize as reasonable . . . bear an uncanny resemblance to those expectations of privacy this Court considers reasonable.” *Id.* (citing *Katz*, 389 U.S. at 361).

62. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

63. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 9.04, at 131 (2d ed. 1997).

64. *Spinelli*, 393 U.S. at 415.

65. 462 U.S. 213 (1983).

66. *Id.* at 272-74 (White, J., concurring).

67. 47 M.J. 461 (1998).

68. *Id.*

69. *Id.*

70. *Id.* at 463-65.

71. *Id.* at 462.

72. *Id.* at 465.

73. *Id.*

74. *Id.* at 466 (Sullivan, J., concurring).

still provides a practical standard for the court. This test is a way for the court to break probable cause down into two understandable elements, as opposed to the amorphous “totality of the circumstances” test of *Illinois v. Gates*. Further, the older test is more “stringent” than *Illinois v. Gates*:⁷⁵ the judge making the ruling can feel assured that if the *Aguilar-Spinelli* criteria are met, the required *Illinois v. Gates* threshold will be cleared. In light of *Hester*, it may be helpful for the government to consider using the older test when establishing probable cause, for analytical clarity, while understanding that the test is not the required one.

Polygraphs and Probable Cause

Does Military Rule of Evidence (MRE) 707, which prohibits the use of polygraph evidence, apply to *all* phases of a court-martial, to include motions hearings, or solely to the trial on the merits?⁷⁶ The CAAF deliberately avoided answering that question this year in a case involving polygraph testing and probable cause. The case, *United States v. Light*,⁷⁷ involved stolen night vision goggles (NVGs). After an overnight training exercise, Light’s commander discovered that a set of NVGs was missing. The command subsequently locked down the unit for twenty-three days.⁷⁸ Suspicions centered on Light, who failed a polygraph.⁷⁹ Three weeks after the NVGs were discovered missing, a Texas justice of the peace issued a warrant to search Light’s off-post apartment, based, in part, on the failed polygraph test.⁸⁰ Investigators found the NVGs in the apartment, and Light was charged and subsequently convicted of larceny.⁸¹

One question before the court was whether the probable cause determination was valid, given that it was based, in part, on the polygraph examination.⁸² Judge Crawford examined both MRE 707, which appears to prohibit the use of polygraph

information in courts-martial, and MRE 104, which allows a military judge to use any unprivileged information when determining preliminary evidentiary questions.⁸³ Noting the inherent tension between the two, she avoided ruling on which rule “trumps” the other. Instead, she asserted that the President “may choose to clarify” the matter.⁸⁴ The court upheld the warrant because there was sufficient information independent of the polygraph test to justify a probable cause search.

Because of the ambiguity in MRE 707, it is safe to conclude that the polygraph result itself should not be the *sole* basis for a probable cause determination. What gives the issue added complexity, however, is the possibility of the “good faith” exception for law enforcement officials who obtain the search warrant or authorization.⁸⁵ If the magistrate makes a probable cause determination on the basis—in part or totally—of a polygraph result, and the police rely in “good faith” on the warrant, why would obtained evidence be excluded? The MRE do not explicitly prohibit the government from presenting polygraph results to a magistrate; therefore, it would be hard to say that “bad faith” existed. Furthermore, under the *Illinois v. Gates* “totality of the circumstances” test, one might reasonably conclude that this type of evidence is appropriate for a magistrate to use in making the probable cause determination. Until a definite statement on the applicability of MRE 707 is made, however, government counsel who are attempting to use polygraph evidence for preliminary matters, such as motions, should proceed with caution.

The Reasonableness of Executions of Searches and Seizures

“Knock and Announce”: Warrants and the Destruction of Property

75. “Thus, the military magistrate had probable cause to issue the search authorization, even under the more stringent *Aguilar-Spinelli* probable cause test.” *Id.* at 465.

76. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (1998) [hereinafter MCM].

77. 48 M.J. 187 (1988).

78. *Id.* at 188.

79. *Id.* at 189.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 190-91. The court noted that MRE 707 was, in part, an adaptation of section 351.1(a) of the California Evidence Code. Military Rule of Evidence 707, however, omits the provision in that statute that prohibits the use of polygraph evidence in pre- and post-trial motions and hearings. *Id.* at 191.

84. *Id.* at 191.

85. The Supreme Court announced the “good faith” exception in *United States v. Leon*. See *United States v. Leon*, 468 U.S. 897 (1984). This exception provides that evidence obtained pursuant to a search warrant that lacks probable cause may nevertheless be admitted into trial if the law enforcement official who obtained the warrant reasonably believed the warrant was valid. *Id.* For the military, MRE 311(b)(3) codifies the good faith exception. MCM, *supra* note 76, MIL. R. EVID. 311(b)(3).

The Supreme Court has recently devoted more attention to how law enforcement officials execute a Fourth Amendment search,⁸⁶ focusing in particular on so-called “no-knock” warrants.⁸⁷ The Supreme Court further developed this area of Fourth Amendment law in *United States v. Ramirez*,⁸⁸ which dealt with property destruction during the execution of a warrant.

In *Ramirez*, police obtained information that an armed and highly dangerous felon was staying in Ramirez’s home.⁸⁹ The police also had information that there might be a stash of weapons in his garage.⁹⁰ In order to protect themselves from someone obtaining a weapon from the garage during the warrant’s execution, they broke a single garage window.⁹¹ An officer pointed a gun through the broken window to dissuade entry into the garage, while other officers simultaneously announced the warrant.⁹²

The lower courts held that the police violated both the Fourth Amendment and California law because there was insufficient exigency to warrant the destruction of the window. The lower courts made this finding even though the government met the reasonable suspicion standard for a “no-knock” warrant under *Richards v. Wisconsin*.⁹³ While a “mild exigency” might be sufficient to justify a no-knock entry, more specific inferences of exigency were needed to justify property destruction.⁹⁴

The Supreme Court rejected the necessity for a higher standard to justify the destruction or damage of private property during the execution. The same test the Supreme Court articulated for a so-called “no-knock warrant”—whether there is reasonable suspicion that knocking and announcing would be

dangerous, futile, or destructive to investigation—applies in determining whether property needs to be destroyed.⁹⁵

The case does not fully explain the “reasonable suspicion” test. It appears, however, that destruction of property is permissible if a law enforcement official has a reasonable suspicion that something will occur that would be dangerous, futile, or destructive to an investigation, and that destruction of property would prevent this. Of course, the Court implies that the destruction must be reasonable.⁹⁶ Thus, a police officer who has a reasonable suspicion that an event will occur (for example, that someone would go into the garage and get a firearm), must still execute the warrant in a fashion that is tailored to this suspicion. In this case, breaking one window was reasonable because it caused minimal property damage. Obviously, setting the garage ablaze would have been unreasonable. The more problematic question is how far the police can go in executing a warrant to ensure injury or evidence destruction does not happen. In the modern world of well-armed drug traffickers, extremists, and terrorists, *Ramirez* leaves some interesting questions unanswered.

United States v. Miller: “Suspect” and “Reasonable Suspicion”—What One Word Can Do

The standard for what justifies a so-called “Terry” stop, based upon the famous Supreme Court case *Terry v. Ohio*,⁹⁷ is reasonable suspicion. This standard is defined for the military in MRE 314(f).⁹⁸ But is having reasonable suspicion as defined in MRE 314(f) equivalent to considering a person a “suspect?” Language in a recent CAAF opinion, *United States v. Miller*,⁹⁹ suggests that the court considered the standards the same.

86. The most recent case is *City of West Covina v. Perkins*, which was decided in January 1999. See *City of West Covina v. Perkins*, 119 S. Ct. 678 (1999) (holding that when police seize property, they are not required to provide the owner with notice of available state law remedies to recover the property).

87. See, e.g., *Wilson v. Arkansas*, 514 U.S. 927 (1995) (discussing the common law requirement that law enforcement officials must knock and announce their presence before executing a warrant); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (holding that blanket statutory exceptions to this requirement are not permitted; case-by-case assessment required).

88. 118 S. Ct. 992 (1998).

89. *Id.* at 995.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 996. Under *Richards v. Wisconsin*, police can dispense with the “knock and announce” requirement if they have reasonable suspicion that knocking and announcing could be dangerous, futile, or destructive to investigation’s purpose. See *Richards v. Wisconsin*, 520 U.S. 385 (1997).

94. *Ramirez*, 118 S. Ct. at 996.

95. *Id.* at 998.

96. Regarding the facts in *Ramirez*, the Court stated: “As for the manner in which the entry was accomplished, the police here broke a single window in respondent’s garage Their conduct was clearly reasonable and we conclude that there was no Fourth Amendment violation.” *Id.* at 997 (footnote omitted).

97. 392 U.S. 1 (1968).

Miller was one of five Marines who had been interviewed by an MP about a robbery.¹⁰⁰ That MP had released them back to their barracks when another MP, Lance Corporal Sepulvado, came on the scene.¹⁰¹ Sepulvado had been investigating the same robbery that evening.¹⁰² Miller then made some incriminating remarks to Sepulvado.¹⁰³

Writing for the majority, Judge Gierke discussed the constitutional and UCMJ issues that were implicated in Sepulvado's questioning. The CAAF first ruled that Sepulvado's interview of Miller was not a Fifth Amendment custodial interrogation because Miller was not restrained during the questioning.¹⁰⁴ It also held that Sepulvado did not conduct an interrogation that would have required him to advise Miller of his Article 31(b) rights.¹⁰⁵ The CAAF then moved into a Fourth Amendment analysis. It stated that Sepulvado's questioning did not constitute a *Terry* stop. Instead, Sepulvado only questioned the five Marines to find witnesses. The investigation had not narrowed enough for Sepulvado's questioning to "amount to a *Terry* stop."¹⁰⁶

One might conclude that because the court held that Sepulvado's questioning did not amount to a *Terry* stop, such a stop

has a lower threshold for invoking the rights advisement than does Article 31(b). But the actual language the court used equates the two. The opinion states: "We agree with the court below that the information available to Sepulvado falls short of the reasonable suspicion required for a *Terry* stop, and that no *Terry* stop occurred. Accordingly, we hold that appellant was not a suspect within the meaning of Article 31[b]."¹⁰⁷ In this case, the word "accordingly" creates the issue. In that last sentence, the court apparently equated the standard for being a "suspect" under Article 31(b) with the standard for making a *Terry* stop.

Are the standards the same? Case law discussing Article 31(b) requires an interrogator to give the rights advisement when he believes or should reasonably believe that the person being interrogated has committed an offense.¹⁰⁸ In the military, the *Terry* standard focuses on whether criminal activity may be afoot.¹⁰⁹ While the standards seem very similar, the editors of the *Military Rules of Evidence Manual* acknowledge, at least implicitly, that they are not synonymous.¹¹⁰ Likewise, in the analysis of MRE 314(f), the drafters also comment that the two standards are generally—but not always—the same.¹¹¹

98. According to Military Rule of Evidence 314(f):

A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

MCM, *supra* note 76, MIL. R. EVID. 314(f).

99. 48 M.J. 49 (1998).

100. *Id.* at 53.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 54.

105. *Id.*

106. *Id.*

107. *Id.* (emphasis added).

108. See *United States v. Morris*, 13 M.J. 297 (C.M.A. 1982).

109. Military Rule 314(f) states:

A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot.

MCM, *supra* note 76, MIL. R. EVID. 314(f).

110. "Although the Rule [314(f)] does not address the issues of duration or type of questioning which may take place after the stop, those making such stops should be sensitive to the *possibility* that the person detained may be a suspect entitled to rights warnings before being questioned." STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 373 (4th ed. 1997) (emphasis added).

Furthermore, in federal courts, the permissible basis for *Terry* stops have included so-called “unparticularized” bases for stops probably not rising to the level of Article 31(b) suspicion. These include reactions to the presence of police, the fact that a person does not “belong” at a particular place, and the locations where police observe suspects.¹¹² If the CAAF equates Article 31(b) and *Terry*, then it seems to reject such unparticularized *Terry* stops, for it would make no sense to read someone his Article 31(b) rights if the law enforcement official cannot particularize the offense he suspects the person of having committed.

This has obvious advantages for the defense. If a *Terry* stop occurs under this reading, an Article 31(b) rights advisement is required. Furthermore, if there is not “particularized” suspicion, then the *Terry* stop is invalid, and any evidence derived should be suppressed. A defense counsel may want to persuade a judge to hold the two standards synonymous using the language in *Miller*. The government’s response may be to say that the CAAF was unclear on whether particularized suspicion is needed for a *Terry* stop. Furthermore, even if standards are practically synonymous in some cases, analysts have concluded that is not always the case.¹¹³ Therefore, *Miller*’s use of that word should not, in and of itself, define *Terry* stops in the military.

Searches Incident to Arrest: Drawing the Line at Arrest

One familiar Fourth Amendment exception is the search conducted incident to an arrest. The Supreme Court has held that if a person is arrested, police can search him as well as the area immediately within his “wingspan” without further probable cause or a search warrant.¹¹⁴ When the police make arrests in automobiles, the “wingspan” includes the entire passenger compartment of the vehicle.¹¹⁵ While this is a settled point of Fourth Amendment case law, an Iowa statute extended the ability to conduct such a search beyond arrests made pursuant to traffic stops. The Iowa statute allowed police to conduct a “wingspan” search when they issued traffic citations in lieu of making arrests.¹¹⁶

The Supreme Court held this statute unconstitutional in *Knowles v. Iowa*.¹¹⁷ In that case, the police stopped Knowles after clocking him driving at forty-three miles per hour in a twenty-five mile per hour zone.¹¹⁸ While under Iowa law the police officer who stopped Knowles could have arrested him, he instead issued a citation and then conducted a full search of the car. Under the driver’s seat he found a bag of marijuana and a “pot pipe.”¹¹⁹ The police officer arrested Knowles and charged him with dealing controlled substances.¹²⁰

At trial, Knowles argued that the search was not lawful under the “search incident to arrest” rationale because the police officer did not arrest him, even though the Iowa statute permitted such searches when the police give citations in lieu of arrests.¹²¹ The Supreme Court of Iowa upheld the conviction, but the Supreme Court reversed. Writing for a unanimous court, Chief Justice Rehnquist noted that the two reasons that justify searches incident to arrest—the need to disarm a suspect in order to take him into custody and the need to preserve evidence for later use at trial—are far less persuasive when a

111. “Generally it would appear that any individual who can be lawfully stopped is *likely* to be a suspect for the purposes of Article 31(b).” MCM, *supra* note 76, MIL. R. EVID. 314(f) analysis, app. 22, at A22-26 (emphasis added).

112. See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975, 987-1001 (1998) (discussing *United States v. Holland*, 510 F.2d 895, 897 (5th Cir. 1992); *United States v. Bautista*, 684 F.2d 1286, 1289 (6th Cir. 1982)). Harris criticizes the lower courts’ “loosening” of the concept of particularized suspicion that he contends the Supreme Court intended to create in *Terry v. Ohio*. *Id.*

113. See *supra* notes 108-09 and accompanying text.

114. See *Chimel v. California*, 395 U.S. 752 (1969).

115. See MCM, *supra* note 76, MIL. R. EVID. 314(g). This exception should not be confused with the “automobile exception” that allows a search of a mobile automobile without a search warrant if the law enforcement official has probable cause that evidence of a crime is in the automobile. *Id.* MIL. R. EVID. 315(g)(3).

116. IOWA CODE ANN. § 805.1(4) (West Supp. 1997).

117. 119 S. Ct. 484 (1998).

118. *Id.* at 486.

119. *Id.*

120. *Id.*

121. *Id.*

police officer only issues a citation.¹²² A routine traffic stop, as opposed to an arrest, is relatively brief, and less inherently dangerous than an arrest.¹²³ Furthermore, once the police obtain evidence, such as a vehicle registration or a driver's license, immediately after the stop, a further search is not necessary—the evidence obtained is sufficient. The police officer can arrest the driver, if he needs further evidence to prove identification.¹²⁴

While this second rationale makes considerable sense, one could argue that vehicle stops involving citations may be as dangerous as those involving arrests. This is precisely because the driver or passengers have *not* been arrested, but are relatively free to move inside or around the vehicle while the citation is being issued. Nevertheless, perhaps to avoid tumbling down a never-ending “slippery slope” of exceptions, the court has drawn the line at arrests. Here, at least, is one bright line law in Fourth Amendment jurisprudence: a search incident to arrest really means what it says—if something other than an arrest occurs, one should look beyond this exception to justify a search.

This case has impact for military practitioners not just at trial, but also while performing legal reviews of on-post procedures for stopping vehicles for minor traffic infractions. What must be clear in reviewing such procedures are the distinctions between searches incident to arrest/apprehension and searches based upon the “automobile exception.”¹²⁵ A search incident to arrest or apprehension would allow a search of the passenger compartment of a vehicle based upon the probable cause for the arrest/apprehension itself. The automobile exception would allow a police officer to search a vehicle, including the trunk, without a search warrant/authorization, if the police officer had probable cause to believe that evidence was in the vehicle. Understanding the “arrest” limitation in *Knowles*, as well as the

distinction between the two exceptions, is critical in evaluating any traffic stop procedures.

United States v. Jackson: Does MRE 313b Have a Future?

By far, the most important military Fourth Amendment case of 1998 was *United States v. Jackson*,¹²⁶ which dealt with the so-called “subterfuge” rule in MRE 313(b).¹²⁷ Under MRE 313(b), if the purpose of an inspection is to locate weapons or contraband, and if (1) the inspection was ordered immediately after the report of a crime, or (2) specific individuals were selected for inspection, or (3) persons inspected were subjected to substantially different intrusions, the government must prove by clear and convincing evidence that the primary purpose of the inspection was administrative and not a criminal search.¹²⁸

In *Jackson*, an anonymous friend of the accused reported that she had seen Jackson selling drugs in his barracks room on the previous evening and that he hid the drugs in a stereo speaker in his barracks room.¹²⁹ The unit commander, who had received this information from a Criminal Investigation Division (CID) agent, consulted with his legal advisor, who told him there was insufficient probable cause to authorize a search of the room.¹³⁰ An hour and a half later, the commander ordered a health and welfare inspection of all barracks rooms. He used drug-sniffing dogs and posted noncommissioned officers as guards at all entrances and exits of the barracks to prevent anyone from removing evidence.¹³¹ A dog alerted on Jackson's stereo speakers, and marijuana was found there.¹³²

At trial, the unit commander testified that the primary purpose of the inspection was “unit readiness and also to find out on a whole what the unit was like for drugs . . . [i]f there was any contraband in the rooms or anything else.”¹³³ Finding that the primary purpose of the examination was to ensure unit

122. *Id.* at 487-88.

123. *Id.* at 487.

124. *Id.* at 488.

125. See MCM, *supra* note 76, MIL. R. EVID. 314(g) (discussing searches incident to apprehension), 315(g)(3) (discussing the military's version of the “automobile exception”).

126. 48 M.J. 292 (1998).

127. MCM, *supra* note 76, MIL. R. EVID. 313(b).

128. *Jackson*, 48 M.J. at 292.

129. *Id.* at 294.

130. *Id.*

131. *Id.*

132. *Id.* at 293.

133. *Id.*

readiness, the military judge admitted the marijuana into evidence.¹³⁴

In affirming the military judge's ruling, the CAAF held that the government overcame the "clear and convincing" evidentiary standard of the subterfuge rule.¹³⁵ How did the court determine that by "clear and convincing evidence" the government showed that the primary purpose of the examination was administrative? The court looked primarily at the commander's testimony that his primary purpose in conducting the inspection was unit readiness.¹³⁶ The commander's additional testimony that he considered that any contraband discovered could be used for UCMJ purposes did not affect the validity of the inspection, since that is permitted under MRE 313(b).¹³⁷ In addition, the presence of drug detector dogs and CID agents did not taint the inspection because MRE 313(b) permits an inspection to locate weapons and contraband.¹³⁸ Another key consideration was the nature of the contraband—illegal drugs. Judge Effron, writing for the majority, stated: "Any commander who ignores the potential presence of illegal drugs in the unit does so in disregard of his or her responsibility and accountability for the readiness of that unit."¹³⁹

Jackson was a four-to-one decision. Judge Gierke wrote a sharp dissent, asserting that the decision removed privacy from soldiers in the barracks, virtually erased the subterfuge rule, and made probable cause analysis in the barracks all but superfluous.¹⁴⁰ He wrote that the opinion would result in the situation "where it may be unlawful to invade the privacy of one soldier

unless the privacy of 100 others is invaded at the same time."¹⁴¹ He further stated that the fact that drugs impair unit readiness "tells us little about prosecutorial intent."¹⁴² Finally, in determining the purpose of the inspection, he wrote: "While the commander's stated intent is an important factor, it is not a talisman at which legal analysis stops."¹⁴³ But Judge Gierke thought the trial court *did* indeed stop there. He noted that there was neither a pre-planned inspection nor an apparent unit-wide drug problem.¹⁴⁴

Does *Jackson* signal the end of the MRE 313(b) subterfuge rule? Is it a further reduction in barracks privacy, begun by *United States v. McCarthy*?¹⁴⁵ Or is it a case decided, in large part, on very particular facts? The *nature* of the contraband appeared to be particularly significant; in his discussion, Judge Effron more than once referred to the impact of drugs on unit readiness.¹⁴⁶ Thus, one approach is to look at *Jackson* conservatively and distinguish it from other cases based upon the contraband (drugs) and where the contraband was found (in the barracks). Another distinguishing point is that the commander "triggered" the subterfuge rule by doing the inspection immediately after the report of an offense. The commander did not subject soldiers to different intrusions or subject only certain soldiers to an inspection—the other two prongs of the subterfuge rule. While Judge Effron does not explicitly make this point, he does mention that the command inspected all thirty-six barracks rooms and did not specifically target the accused after receiving the anonymous tip.¹⁴⁷

134. *Id.*

135. *Id.* See MCM, *supra* note 76, MIL. R. EVID. 313(b).

136. *Jackson*, 48 M.J. at 293.

137. *Id.* at 295.

138. *Id.* at 296.

139. *Id.* at 295. In a footnote to his opinion, Judge Effron also made reference to the "ongoing problem of drug distribution in the barracks." *Id.* at 296 n.2.

140. "In my view the majority opinion removes any expectation of privacy for soldiers living in a barracks, eliminates any meaningful distinction between a search and an inspection, and renders [MRE] 315 (probable cause searches) . . . meaningless and unnecessary." *Id.* at 297.

141. *Id.*

142. *Id.*

143. *Id.* at 298.

144. *Id.* at 299.

145. 38 M.J. 398 (C.M.A. 1993).

146. Judge Effron states:

Physical and mental fitness are the quintessential requirements of military readiness. The use of illegal drugs significantly diminishes the user's physical and mental capabilities. . . . Given the oft-cited adverse impact of drugs on unit readiness, it is permissible for the military judge to take into account the nature of the contraband in determining that the threat to unit readiness, rather than the criminal prosecution of an individual, was the primary purpose of the inspection.

Jackson, 48 M.J. at 296-97.

Distinguishing *Jackson* based upon the nature of the contraband seized and how many prongs of MRE 313(b) triggered the subterfuge rule is perhaps a defense counsel's best initial position.¹⁴⁸ Furthermore, defense counsel should be alert to statements made by the commander or other members of the chain-of-command while they are conducting the inspection. Such statements could indicate what the primary purpose was and should be evaluated along with any statements made during court.

For the government, caution again would be in order. Judge Effron notes that whether the government can meet the clear and convincing standard "depends on the specific facts and circumstances of the case, including the nature of the contraband."¹⁴⁹ Therefore, applying *Jackson* to circumstances not involving drugs in the barracks goes beyond the holding of the case and could lead to a different result. It will often be more prudent to work on establishing probable cause from an anonymous tip, rather than immediately conducting an inspection. Again, however, context is important. A commander whose unit is ready to deploy overseas has a considerably stronger argument that his primary purpose is unit readiness than a commander of a unit in garrison status. Nevertheless, *Jackson* stands as the latest of a series of recent cases that present a more restrictive view of the subterfuge rule than in years past.¹⁵⁰

Conclusion

While it is difficult to pick out any "trends" in the above cases, some of them stand for major propositions that will affect Fourth Amendment jurisprudence, both in the military and civilian communities. In the military, the consequences of *Jackson* will be particularly worth noting. Will there be anything left of the subterfuge rule, as Judge Gierke doubted in his

dissent,¹⁵¹ or will the next case be yet another fact-specific Fourth Amendment holding? The Supreme Court's rulings in *Knowles* and *Carter* reaffirm the Court's adherence to standard Fourth Amendment doctrines. *Knowles* states that a search incident to an arrest must really accompany an arrest. *Carter* reaffirms the Court's post-*Rakas* rejection of typical standing concepts in favor of the expectation of privacy rationale formulated in *Katz*.¹⁵² Other cases discussed either leave certain questions unanswered (such as whether polygraphs can be used in probable cause determinations)¹⁵³ or perhaps create questions themselves (such as whether the definitions of "suspect" and "reasonable suspicion" are synonymous).¹⁵⁴ Still, even the relatively few cases on the Fourth Amendment front lead practitioners to conclude that search and seizure remains a controversial and unsettled body of law in both the military and civilian communities.

Addendum: *Wyoming v. Houghton*: Another Bright Line?

If *Knowles v. Iowa* represents a "bright line" Fourth Amendment rule favoring defendants who are stopped but not arrested, a recent case, *Wyoming v. Houghton*,¹⁵⁵ shows the Supreme Court attempting to make a bright line rule favoring law enforcement.¹⁵⁶ This time, the Supreme Court holds that, when conducting an automobile search based upon probable cause, there is no need for the law enforcement official to distinguish between containers within the vehicle that belong to a passenger and not the driver – all such containers may be searched.¹⁵⁷

In *Houghton*, a patrol officer stopped a vehicle for speeding and driving with a faulty brake light.¹⁵⁸ While he questioned the driver, the officer noticed a hypodermic syringe in the driver's shirt pocket.¹⁵⁹ The driver admitted that he used the syringe to take drugs.¹⁶⁰ As a result, the patrol officer ordered the two

147. *Id.* at 295-96.

148. Only an inspection for weapons or contraband triggers the subterfuge rule. Contraband is defined as "material the possession of which is by its very nature unlawful. Material may be declared to be unlawful by appropriate statute, regulation or order. For example, if liquor is prohibited aboard ship, a shipboard inspection for liquor must comply with the rules for inspection for contraband." MCM, *supra* note 76, MIL. R. EVID. 313(b) analysis, app. 22, at A22-23 (1998).

149. *Jackson*, 48 M.J. at 296 n.2.

150. See *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994) (holding that an accused's urinalysis inspection test results were properly admitted despite an officer-in-charge, who knew of a report of drug use, volunteering the accused's section for the urinalysis); *United States v. Shover*, 45 M.J. 119 (1996) (holding that an inspection was proper where its primary purpose was to end "finger pointing" and "tension").

151. *Jackson*, 48 M.J. 292, 297 (1998) (Gierke, J., dissenting).

152. See *Knowles v. Iowa*, 119 S. Ct. 484 (1998); *Minnesota v. Carter*, 119 S. Ct. 469 (1998).

153. See *United States v. Light*, 48 M.J. 187 (1998).

154. See *United States v. Miller*, 48 M.J. 49 (1998).

155. *Wyoming v. Houghton*, No. 98-184, 1999 WL 181177 (Sup. Ct., Apr. 5, 1999).

156. *Knowles v. Iowa*, 119 S. Ct. 484 (1998).

157. *Houghton*, 1999 WL 18117, at *1.

158. *Id.* at *2.

other passengers, one of whom was the defendant, out of the car.¹⁶¹ An officer then began a search of the passenger compartment of the vehicle.¹⁶² He found a purse, which Houghton claimed as hers.¹⁶³ Inside the purse he found a brown pouch that contained drug paraphernalia and a syringe containing 60ccs of methamphetamine, and a black container, containing 10 ccs of methamphetamine.¹⁶⁴

The Wyoming Supreme Court reversed Houghton's conviction for possession of methamphetamine. In so doing, the court announced that if, during an automobile search, an officer knows or should know that a container belongs to a passenger, who is not suspected of criminal activity, the container is outside the scope of the search.¹⁶⁵ The Wyoming Supreme Court did hold that such a search could be valid if someone could conceal contraband within the a passenger's personal effects to escape detection. In this case, however, there was no reason to believe that such contraband had been placed in Houghton's purse.¹⁶⁶

The Supreme Court reversed the Wyoming Supreme Court's decision. Justice Scalia wrote the majority opinion, and his opinion is interesting not only for the proposition it announces, but for the method he used to arrive at his conclusion. In most Fourth Amendment cases, opinion writers start from seemingly accepted jurisprudential premises such as "reasonable expectations of privacy." In *Houghton*, Justice Scalia states that the first inquiry must be historical: an examination of common law at the time of the Framers to determine whether the action was

regarded as an unlawful search and seizure.¹⁶⁷ If that yields no answer, then standard Fourth Amendment analysis is used: an evaluation "under traditional standards of reasonableness by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."¹⁶⁸

In *Houghton*, both the common law at the time of the Framers and the legitimate governmental interests favored the government. Justice Scalia cited past precedents which held that the Framers would have concluded that warrantless searches of automobiles and containers within automobiles were reasonable.¹⁶⁹ Justice Scalia further pointed out that distinctions based upon ownership were irrelevant when conducting the searches.¹⁷⁰ In addition, Justice Scalia opined that governmental interests outweighed privacy interests and passengers have reduced expectations of privacy with regard to items they transport.¹⁷¹ Requiring additional, independent probable cause to search a passenger's containers could create a potential "safe haven" for storing the contraband or evidence of a driver's criminal activity.¹⁷²

At first glance, *Houghton* appears to be a "bright line" rule providing that law enforcement officials may search containers within automobiles, regardless of ownership. But how far can *Houghton* extend? After all, the case does not do away with the probable cause analysis. Law enforcement officials must still have probable cause to believe that an item is in a particular

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at *3.

167. *Id.* at *3. This drew criticism in a footnote in Justice Stevens' dissent: "To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law yields 'no answer.'" *Id.* at *9 n3 (Stevens, J., dissenting).

168. *Id.* at *3.

169. *Id.* at *3-4. Specifically, Justice Scalia relied on a series of cases in which the Court concluded "that the Framers would have regarded such a search [warrantless automobile search] as reasonable in light of legislation from the Founding era and beyond—that empowered customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to duty." *Id.* at *3 (citing *United States v. Ross*, 456 U.S. 798 (1982); *Carroll v. United States*, 267 U.S. 132 (1925); *Boyd v. United States*, 116 U.S. 616 (1886)).

170. *Houghton*, 1999 WL 1811177, at *4.

171. *Id.* at *5.

172. "[A] car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Id.* at *6.

container. One of the cases that Justice Scalia's opinion relied upon, *United States v. Ross*, states that "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."¹⁷³ Thus the standard probable cause restrictions (such as whether an item could reasonably fit into a container) independent of ownership still apply. Justice Scalia also asserted that *Houghton* does not extend to a search of a person within the automobile—even a limited search of outer clothing.¹⁷⁴ In a concurring opinion, Justice Breyer concluded that it would not extend to a search of a container "attached" to a person, such as a woman's purse worn on her shoulder.¹⁷⁵

Whether *Houghton* will be used to justify searches of passenger containers in other contexts—such as public transportation, in temporary lodging, or in other persons' homes—is uncertain. Rhetorical and analytical overkill—from both political directions—often follows opinions that are written by Justice Scalia. Often overlooked is that the comparatively idiosyncratic historical approach of Scalia makes his cases easy to distinguish, not only because their reliance on history may provide a "brake" on somewhat amorphous concepts such as "reasonable expectation of privacy" but also because they are often considered outside the so-called jurisprudential "mainstream" approach. What is clear is that *Houghton* allows law enforcement officials to search containers, regardless of ownership, during a warrantless automobile search.

173. *Id.* at *4 (citing *United States v. Ross*, 456 U.S. 798 at 826 (1982)).

174. *Id.* at *5. Justice Breyer points this out in his concurrence as well. *Id.* at *7 (Breyer, J., concurring).

175. *Id.* at *7 (Breyer, J., concurring).